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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1090

KEITH B. REDD, d/b/a ABAJO PETROLEUM,
Petitioner,

v.

SHELL OIL COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR SHELL OIL COMPANY IN OPPOSITION

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KEITH B. REDD, d/b/a ABAJO PETROLEUM,
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BRIEF FOR SHELL OIL COMPANY IN OPPOSITION

OPINIONS BELOW

The Opinion of the Court of Appeals (Pet. App. A-1-7)[1] is reported at 524 F.2d 1054. The Order of the District Court (App. 351-52) granting partial summary judgment to Petitioner is not officially reported, but is found at 1974-1 Trade Cas. ¶ 75,064 (D. Utah 1974). The Opinion of the District Court (Pet. App. A-8-27)

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[1] "Pet. App." refers to the Appendices to the Petition for Writ of Certiorari. "App." refers to the Joint Appendix in the Court of Appeals.

is not officially reported, but is found at 1974-2 Trade Cas. ¶ 75,390 (D. Utah 1974).

JURISDICTION

The judgment of the Court of Appeals was entered on November 3, 1975. The petition for writ of certiorari was filed on February 2, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

(1) Whether the Court of Appeals erred in reversing the District Court's summary judgment finding contractual territorial provisions to be illegal *per se* where there was a fact question of enforcement or compliance with the provisions.

(2) Whether the Court of Appeals erred in reversing the District Court's summary judgment on plaintiff's claim of illegal tying, in which it held as a matter of law that Shell's trademark was a separate "product" from the products it identified.

STATUTES INVOLVED

The pertinent statutory provisions are set forth at Pet. App. B-1.

COUNTERSTATEMENT OF THE CASE

The Petition in this case seeks review of the unanimous decision of the Court of Appeals reversing the District Court's grant of summary judgment in a complex antitrust action on issues of territorial restriction and the tying of trademarked products.

The Petition's statement of the case (Pet. 5-15) presents a lengthy recitation of facts, often disputed or unsupported by the record, and largely directed at arguments not considered by the Court of Appeals. This counterstatement will not attempt to review the entire case, but will be confined to (1) a brief history of the litigation to put the issues in context, (2) a summary of the decision of the appellate court, and (3) a statement of the facts relevant to the two issues considered in that decision.

A. History of the Proceeding

Petitioner (Keith B. Redd) is a jobber of petroleum and related motor products which he purchased from Shell Oil Company ("Shell") and other suppliers and redistributed to service stations and commercial accounts in Southeast Utah and neighboring Arizona (App. 12, 2035-39). When Shell decided in 1971 that its gasoline marketing in Utah was unprofitable, it terminated its jobber sales contract with Redd (App. 220-27). Shortly thereafter, Redd brought this action in the District Court for the District of Utah; it was assigned to Chief Judge Willis Ritter, who handled all the pretrial and trial proceedings (App. 11-19).

In the original two-count complaint, filed on May 19, 1971, Redd charged in the first count a conspiracy between Shell and Continental Oil Company in violation of the antitrust laws to eliminate competition, to restrict his marketing territory, and to terminate his jobber sales contract with Shell (App. 14-16). The second count charged breach of contract (App. 17-18), but that claim is not before this Court. Shell answered the complaint charges with denials and counterclaimed for the outstanding balance on the Redd account (App. 20-24).

Neither the antitrust allegations of the original complaint nor the debt claim of the original counterclaim

remained in issue through trial: Redd dropped the charge of conspiracy with Continental on the eve of trial (App. 353-59), and the outstanding account balance sought under the counterclaim was paid off during the trial. Continental was dismissed pursuant to stipulation before the trial (App. 2, seventh entry).

The antitrust issues presented by Petitioner to this Court arose when Shell learned during pretrial discovery that, for at least five of the seven years of his jobber sales contract with Shell, Redd had been palming off on the public as Shell gasoline cheap gasoline he bought from others (App. 2080-93). In fact, nearly one-half of the gasoline sold by Redd as Shell gasoline was cheap non-Shell gasoline (App. 205). In consequence of this disclosure, Shell, on July 1, 1971, amended its counterclaim to charge trademark infringement and "palming-off" in violation of federal statutes and the common law (App. 30-34).

As a defense to the added counterclaim, Redd alleged that Shell was barred from complaining of trademark infringement because it had misused its trademark in violation of the antitrust laws by tying the Shell trademark to its petroleum products and by restricting Redd's marketing territory (App. 38 and original record 393-408). Shell moved for summary judgment on the trademark infringement claim, but the District Court denied the motion without opinion (App. 3, sixth entry).

On September 28, 1972, Redd filed an amended complaint adding a new count claiming affirmatively that the provisions of his jobber sales contract prohibiting misuse of the Shell trademark unlawfully tied the Shell trademark to its products (App. 68-71). Thereafter, plaintiff Redd moved for partial summary judgment on the trademark tying claim (App. 165-68), while Shell renewed its motion for partial summary judgment on its counterclaim for trademark infringement and palming-off (App. 198), which Redd countered with an opposition seeking dismissal of this counterclaim on the basis of the alleged misuse of the trademark (App. 264-79).

On February 15, 1974, the District Court, after briefing and argument, granted summary judgment in favor of plaintiff Redd on his claim that Shell's trademark was unlawfully tied to its products and dismissed Shell's counterclaim for trademark infringement and palming-off (App. 351-52). In its brief order, the District Court stated as the ground for dismissing the trademark infringement counterclaim that "on the uncontroverted facts" Shell had misused its trademarks in connection with a violation of the antitrust laws by "tying the licensing of the defendant Shell's trademarks, brand names and color scheme to the sale and distribution of petroleum products" and by "restricting the territory in which the plaintiff could market and distribute branded petroleum products purchased from the defendant . . ." (*Id.*).

Confronted with sharply conflicting affidavits, the District Court did not set forth the "uncontroverted facts" on which it based its summary judgment rulings. Inexplicably, some ten months later, on December 2, 1974, the District Court issued a memorandum opinion in support of its summary judgment actions (Pet. App. A-8-27). This opinion was filed after the jury trial and judgment and over two months after the notice of appeal was filed with the Court of Appeals for the Tenth Circuit (*see* App. 382).

Shortly before the trial date and unknown to Shell, plaintiff Redd submitted an *ex parte* "pretrial order" to the District Court in which Redd abandoned his claim of conspiracy between Shell and Continental and substituted a new claim that Shell had imposed restrictions on Redd's marketing area (App. 353-59). When Shell learned of this proposed pretrial order, it objected vigorously to its adoption, because no pretrial conference

had been held and the proposed order would, on the eve of trial, change the issues to be tried (App. 360-61). Nevertheless, the District Court adopted the pretrial order on the Friday before the Monday on which trial commenced (App. 2, fifth and sixth entries).

On July 15, 1974, the parties went to trial before a jury with the two antitrust issues—trademark tying and territorial restriction—already decided by the District Court. Basically, the only issue for the jury involved the determination of the amount of damages. At trial, the District Court admitted all of plaintiff's damage calculations despite vigorous objection by Shell to their speculative character (App. 1391-99, 1417-28, 1437-50). During the course of the two-week trial, Shell further objected repeatedly to the fundamental unfairness and prejudice of the trial judge's ruling and conduct. At the conclusion of the trial, the jury returned a verdict and an award for damages of $104,265 (before trebling) on all issues except the allegation that plaintiff Redd's sales contract had been terminated pursuant to antitrust violations (App. 375-77).

Following entry of final judgment (App. 381), Shell filed a notice of appeal to the Court of Appeals for the Tenth Circuit (App. 382), and in that appeal challenged the summary judgment rulings of the District Court on the antitrust issues and raised numerous points of improper and prejudicial conduct by the District Court Judge during the course of the trial, including (1) the unwarranted adoption of plaintiff Redd's "pretrial order" changing the issues to be tried; (2) the repeated statements by the District Court and plaintiff's counsel before the jury to the effect that the Court had already determined that Shell had violated the Sherman Act; (3) the admissibility of plaintiff's purely speculative damage evidence; (4) the exclusion of relevant and admissible evidence offered by Shell; and (5) the giving of every

jury instruction requested by plaintiff Redd, including those contrary to established law, and the rejection of every instruction offered by Shell, including standard instructions approved by the Court of Appeals and this Court.[2]

B. Summary of the Court of Appeals' Decision

On November 3, 1975, the Court of Appeals, in a unanimous decision, reversed the judgment of the District Court by holding that the trial court improperly decided the antitrust issues of trademark tying and territorial restriction on summary motions before trial (Pet. App. A-1-7). In reversing the District Court's rulings on antitrust liability, the Court of Appeals first took up the trademark tying issue and disposed of it on the ground that the District Court committed "error" in considering the Shell trademark "as a separate product sold under a tying arrangement" with Shell gasoline (Pet. App. A-5). Applying the well-established principle "that two different products must be involved before there can be a tying arrangement," the reviewing court found this essential ingredient of a prohibited tying arrangement lacking, since there was "certainly no one else in the market selling the Shell trademark" and "Shell was not selling its trademark separately" (Pet. App. A-4-5).

Since Redd "had his own business enterprise and entity identified under his own name," the Court of Appeals concluded that Redd did not have a "franchise" as that term was used in cases such as *Siegel* v. *Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972) (Pet. App. A-4). Unlike the typical

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[2] During and outside the trial, the trial judge threatened and actually imposed severe sanctions against Shell counsel. In an expedited appeal, the Court of Appeals for the Tenth Circuit, in a separate opinion, reversed and vacated the District Court's imposition of stanctions as "wholly unjustified." *Redd* v. *Shell Oil Co. (In re Graney)*, 518 F.2d 311, 315 (10th Cir. 1975).

fast food franchise involving the licensing of the use of a trademark or trade name on condition that a business be conducted in a prescribed way or in a place with a required appearance, Shell merely sold its trademarked products to Redd, and the permissive trademark use incident to such sales "did not in any way transform the mark into a separate product to be sold to plaintiff" (Pet. App. A-4).

On the issue of territorial restriction, the Court of Appeals reversed the District Court's finding of a *per se* violation on the basis of the contract provisions standing alone (Pet. App. A-5-6). As the Court of Appeals pointed out, "it was error for the trial court to decide as a matter of law that the existence of contractual limitations was sufficient" where there was a factual question of whether such limitations were ever enforced by Shell or complied with by Redd (Pet. App. A-6). In this connection, the Court referred to various decisions of the Tenth Circuit as well as this Court's decision in *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), where, in addition to contract provisions for territorial restrictions, there was "firm and resolute" enforcement of such limitations by the seller (Pet. App. A-6).

Since the errors of the District Court in determining liability on the two antitrust issues pervaded the subsequent proceedings at trial, the Court of Appeals set aside the judgment below, ordered the counterclaim reinstated, and remanded the case for further proceedings in accordance with its opinion (Pet. App. A-7). In view of this disposition of the appeal, the Court below did not pass on the various issues involving the fundamental unfairness of the trial and the prejudicial conduct of the trial court (Pet. App. A-7).

C. The Facts Pertinent to the Two Antitrust Issues

Since 1958, Keith B. Redd has been a wholesale jobber of petroleum products and related motor products trading under the name Abajo Petroleum (App. 428-29, 2036-39, 2062). Redd had his own bulk plants, which are storage facilities for bulk liquids such as gasoline and fuel oil, in Blanding, Utah, and Kayenta, Arizona (App. 2062-63). From his bulk plants, Redd redistributed the products in his own tank trucks to service stations and other commercial customers in Southeast Utah and Northeast Arizona (App. 12).

Redd purchased products from a wide variety of sources over the years, both brand name (*e.g.*, Texaco, Pennzoil, Quaker State, Shell, Exxon) and unbranded (App. 2036-38, 2118-19). Between 1964 and 1971, Redd purchased a portion of his needs for petroleum products from Shell. Whatever products Redd was selling, he maintained his business identity as Abajo Petroleum; for example, his customers were always billed on Abajo Petroleum invoices (App. 319q-r).

The supplier-customer relationship between Shell and Redd was covered by a written jobber sales contract, which was entered into in 1964 and automotically renewed each year until terminated in 1971 (DX-D, App. 637). Because some of the products Shell sold to Redd were bulk liquids (*i.e.*, gasoline and fuel oil) and the Shell trademark could not be affixed to these products, the jobber sales contract contained a provision permitting Redd to use Shell's identifying marks on the container (*i.e.*, the tank truck) in which they were delivered, as follows:

> During the continuance of this Contract, Buyer [Redd] shall have the right to sell, under Shell's trademarks, brand names and color scheme, the prod-

> ucts purchased hereunder, for tank truck delivery . . . Buyer shall not sell, under Shell's trademarks, brand names or color scheme: any product other than the products purchased hereunder; or any mixture or adulteration of any product purchased hereunder with any other product . . . (DX-D, App. 637; emphasis added)[3]

The last part makes it clear that Redd was not permitted to sell non-Shell or adulterated gasoline under Shell's trademarks.

Redd bought and sold the products of many of Shell's competitors without restriction (App. 3190, 2035-39, 2118-19, 2130, 2152). While his sales contract was still in effect, Redd informed Shell that he was going to buy gasoline from another supplier and was told simply: "That's your business" (App. 2093). The only prohibition was that Redd could not market, *as Shell brand products*, products obtained from another supplier.

What Shell did not know until pretrial discovery in this action was that Redd for years had been buying large quantities of cheap locally refined gasoline and distributing it under the Shell trademark, to be sold to the unsuspecting public as genuine Shell product (App. 2080-85). As a result, Redd realized an extra 2 cents a gallon on the cheaper brand gasoline by passing it off as nationally-branded Shell gasoline (App. 2088).

Contrary to the statement of the Petition (Pet. 20 *et seq.*), Redd never requested and was never given a trademark license. The Shell trademark is not sold or licensed to anybody, but exists solely to identify products manufactured or sold by Shell (App. 319a-c). It is undis-

[3] The quotation in the Petition (Pet. 12) omits the underscored qualification, thus conveying the erroneous impression that Shell gave Redd greater permission to use Shell's trademark than he actually received. The permission was in fact limited to use in identifying bulk liquid products resold "for tank truck delivery."

puted that to the consumer Shell's trademark signifies that the products sold under it were made or sold by Snell (App. 319a).

The jobber sales contract between Shell and Redd authorized Redd to distribute Shell products in a designated area.[4] However, the affidavits submitted in opposition to Redd's summary judgment motion and the evidence at trial established that the territorial provision was never enforced or complied with (App. 319c-d, 765). Redd freely distributed outside of his designated area (App. 766-70). He did not even know the boundaries of his area, or that many of his existing customers were in fact located outside the described area (App. 616, 766-70). Redd also admitted that Shell never indicated that he would be penalized for selling outside his area (App. 765).

The territorial provision had neither the purpose nor the effect of limiting the area in which Redd could do business (App. 319d). Neither Shell nor its jobbers considered this provision as anything but an indication of an area of primary responsibility in which the jobber was expected to devote his best efforts (App. 319c-d, 2185-86, 2195-96). The wording of Shell's contract forms was changed in 1968 to make explicit this meaning and intent (*Id.*).[5]

[4] In pertinent part, the sales contract stated:

> During the continuance of this Contract, Buyer shall have the right to sell, . . . the products purchased hereunder, . . . within the territory outlined in red on the map attached hereto (herein called "Buyer's territory") . . . . Buyer shall not sell, . . . any product purchased hereunder outside of, or for delivery or resale outside of, Buyer's territory (Shell's decision to be final as to whether or not any location is within Buyer's territory). (App. 233)

[5] The Petition ignores this change in Shell's jobber contracts and incorrectly states (Pet. 8) that all Shell's 40 jobbers in Shell's Phoenix District had contracts similar to Redd's 1964 contract. The record citations in the Petition do not support this statement.

There is no evidence that Shell ever terminated or took any action against Redd or any other jobber for selling outside his territory (App. 319d). The evidence is that Redd in fact sold Shell products outside his territory, that Shell knew of those sales, and that it took no action to prevent or discourage them (App. 765-70, 2045-49, 2099-2101). Indeed, Shell tried, as Redd admitted, to get him to expand his marketing area—even offering to provide him with an additional bulk plant to serve a new area—but he decided on his own not to expand (App. 2045, 2100-01). Redd admitted that when he became an Exxon jobber after the Shell termination he made no effort to expand his marketing area (App. 2044). Finally, Redd never claimed that he suffered any damages because he could not make a sale outside his area.

Contrary to the statement in the Petition that the territorial provision "was enforced by the termination provision of the contract" (Pet. 7), Shell terminated its sales contract with Redd because its gasoline marketing in that area was unprofitable and Redd's credit and sales performance were unsatisfactory (App. 219-27).

ARGUMENT

I

The Court of Appeals' Holding That Shell's Trademark Is Not A Separate Product from the Products It Identifies Does Not Conflict With the Decisions of Other Circuits

It is settled antitrust law that the threshold issue on a claim of tying is "whether two separate products are in fact involved." *Fortner Enterprises, Inc.* v. *U.S. Steel Corp.*, 394 U.S. 495, 507 (1969). Because the Court below found that the trial court erroneously applied the test of separability, it reversed summary judgment granted in favor of plaintiff and remanded for reinstatement of the

trademark infringement counterclaim. Petitioner now contends that this decision "directly conflicts" with every other circuit that has ruled on the issue (Pet. 21). But the very opposite is the case: no circuit has ever held that the sale of a trademarked product involves the tied sale of two separate items—the trademark and the product.

The basic conflict asserted is with the decision in *Siegel* v. *Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972), and similar cases involving franchises centered on trademark licenses (Pet. 21-23). The differences between the business relationships in *Chicken Delight* and in the sale of trademarked product involved here compel the rejection of the suggested analogy. *Chicken Delight* did not involve the sale of trademarked products, but rather a system of doing business governed by a complex trademark licensing agreement.

Instead of dealing with the essential differences between the trademark licensing agreement in *Chicken Delight* and the typical sale of trademarked products such as that involved here, the Petition repeatedly refers to Redd's "license" to use Shell's trademark (Pet. 20 *et seq.*). But the fact is undisputed in this record that Shell does not "license" its trademark to anyone (App. 319a-c). Under the Shell jobber sales contract, Redd, as a purchaser of trademarked products from Shell, was simply authorized to continue the Shell brand identification, if he chose, through the chain of redistribution. This bare grant of permission to continue brand identification did not make Redd a licensee. See 3 CALLMANN, THE LAW OF UNFAIR COMPETITION TRADEMARKS AND MONOPOLIES § 84.1(b), at 941 (3d ed. 1969).

Further, in *Chicken Delight*, the franchisee was required to obtain through the franchisor "common articles" (paper plates, napkins, cooking utensils and the like)

"which the public does not and has no reason to connect with the trade-mark." 448 F.2d at 49. In the instant case, it is undisputed that consumers across the country take the Shell trademark as a representation that the products marketed thereunder were sold by Shell (App. 319a). Finally, the *Chicken Delight* holding was limited by its rationale and by its own terms to situations "where the tied product is not itself the product represented by the mark." 448 F.2d at 52.

The court below carefully analyzed the unique function of the trademark in *Chicken Delight*, noting that the licensing arrangement there dictated the manner in which the licensee conducted its business, whereas, in contrast, Redd's "trademark use had nothing to do with the manner in which [he] did business" (Pet. App. A-3). Because of the fundamentally different business relationships, the court below found *Chicken Delight* and its progeny "not in point sufficiently to assist us in solving our problem" (Pet. App. A-4). The Petition does not deal with this analysis of the court below distinguishing this case from *Chicken Delight*, but simply labels the two decisions as being "directly conflicting." Plainly, the decisions are not conflicting but different.

The court below and the Ninth Circuit in *Chicken Delight* both applied the same test of separability for tying arrangements. The Ninth Circuit in *Chicken Delight* inquired "whether the items are normally sold or used as a unit" (448 F.2d at 48) and based its conclusion on the facts peculiar to the so-called "rent-a-name" fast food franchises. There, as found by the trier of fact, "a franchise license is marketable separate and apart from the various products which the franchisees are required to purchase from and through the franchisor." 311 F.Supp. 847, 849 (N.D. Cal. 1970).

When the court below applied the same test to the uncontroverted facts of this case, it was clear that the sale

of the trademarked Shell gasoline was not the sale of the Shell trademark tied to the sale of gasoline. As the Court below said: "There was certainly no one else in the market selling the Shell trademark, and Shell was not selling its trademark separately" (Pet. App. A-4).

Petitioner cites various other cases where a trademark licensing arrangement has been held to be a distinct tying product (*see* Pet. 21-22). Four of the five referenced cases decided since *Chicken Delight* dealt with similar business relationships governed by trademark licensing agreements and they add nothing to the law on point. In the fifth case, *Warriner Hermetics, Inc.* v. *Copeland Refrigeration Corp.*, 463 F.2d 1002 (5th Cir.), *cert. denied*, 409 U.S. 1086 (1972), the franchisor, Copeland, used its trademark as leverage to prohibit its licensees from dealing in products other than those manufactured or approved by Copeland. In contrast to Copeland's coercion of exclusive dealing, Shell did not restrict Redd's right to buy competitive products, which he in fact did at all times. The only pre-*Chicken Delight* case, *Susser* v. *Carvel Corp.*, 332 F.2d 505 (2d Cir. 1964), *cert. dismissed*, 381 U.S. 125 (1965), held that a trademark licensing arrangement could be a separate tying product where "Carvel itself manufactures none of the ingredients sold to the dealers" (332 F.2d at 515), but affirmed the dismissal of tying allegations. Thus, these cases, instead of presenting a conflict, simply involve the application of the same legal standard to different facts.

Petitioner's citation (Pet. 22) of the FTC consent order in *In the Matter of Phillips Petroleum Co.*, Dkt. 8930 (December 17, 1974), is mystifying, since that order specifically provided that the petroleum supplier may take appropriate measures to protect his trademark rights and the rights of consumers to purchase accurately identified gasoline:

> Respondent may take such measures as are both lawful and necessary to protect the Respondent's

> trademark rights and to avoid violations of federal and state statutes, and regulations adopted pursuant thereto, governing the distribution, handling or sale of gasoline. (*Id.* at 4.)

In this connection, it should be noted that at least 28 states have passed statutes specifically forbidding the type of gasoline misbranding perpetrated by Redd. *See, e.g.*, Cal. Bus. & Prof. Code § 20849. Thus, under the *Phillips* order, a petroleum supplier is not required to countenance violation of these state statutes or the federal Lanham Act's prohibition against trademark infringement.

The Lanham Act places on all trademark registrants such as Shell the obligation to insure that the trademark is used only to identify the trademarked product. 15 U.S.C. § 1114. The underlying purpose of that Act, to avoid the kind of consumer deception practiced by Redd, was honored by the decision below (Pet. App. A-6-7). Indeed, if a trademark owner were to permit the kind of false branding which the District Court held Redd was entitled to do, the trademark would be subject to cancellation. 15 U.S.C. §§ 1055, 1127; *Dawn Donut Co.* v. *Hart's Food Stores, Inc.*, 267 F.2d 358 (2d Cir. 1959).

Petitioner also argues that Shell established no quality control justification for the "tie-in" because Shell itself purchases some gasoline from other refiners by specification (Pet. 23, 26-27). Such a contention would be relevant only if the threshold requirement of two separate products were met. To set the record straight, however, it should be noted that the small quantities of gasoline purchased by Shell from others are manufactured to Shell's detailed specifications, subjected to continuous analysis for quality control, and supplemented by Shell's additives (App. 319 m-n). Redd, on the other hand, did not even know the octane rating of the gasoline he decided to palm off as Shell gasoline (App. 2084-85, 2119).

For reasons which are not clear, Petitioner urges (Pet. 27-28) that the decision below conflicts with this Court's decision in *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1961). That decision condemned a system of trademark licensing adopted by an international cartel to divide world markets, and it is cited for the proposition that trademark licensing systems are not immune from antitrust scrutiny (Pet. 27). Nothing in the decision below is to the contrary.

Petitioner's effort to create an important issue for review purposes leads him to claim that the decision below must be set aside in order to solve the energy problems of the nation and indeed the world (Pet. 28-29). No coherent reasoning is offered for the contention that the global resolution of complex energy issues will be aided by permitting a jobber in Southeast Utah to palm off on the public, as Shell brand gasoline, gasoline purchased from another supplier. It is inconceivable that any legitimate interest would be served by permitting Redd to profit from the infringement of Shell's trademark and deception of the consumer.

The court below correctly applied well-settled principles of antitrust law in determining that the Shell trademark was not a separate "product" from its petroleum products. The decision below presents no conflict or important issue for review. Since the uncontroverted facts revealed Petitioner to be a trademark infringer, the case was properly remanded to the District Court for further proceedings on Shell's infringement counterclaim.

II

The Decision Below on the Issue of Territorial Restraints Does Not Conflict With This Court's Decision in *Schwinn* or with Decisions of Other Circuits

Petitioner portrays the decision below on the issue of territorial restraints as antithetical to the *per se* rule of

United States v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), and in conflict with recent decisions of the Fifth and Ninth Circuits (Pet. 16-20). Neither argument has merit.

The decision below in no way questions or deviates from *Schwinn's* unequivocal prohibition against territorial restrictions. There remains, however, a factual issue as to whether any such territorial restriction was actually imposed in this case. The Courts of Appeals have consistently stated the issue in the terms used by this Court in *Schwinn*: whether there was "firm and resolute" insistence by the seller on the observation of territorial boundaries. 388 U.S. at 372. This Court's analysis in *Schwinn* "embrace[d]" factual findings that Schwinn had been " 'firm and resolute' in insisting upon observance of territorial and customer limitations" and that "Schwinn's 'firmness' in these respects was grounded upon the communicated danger of termination." 388 U.S. at 372.

The various Courts of Appeals confronted with issues of territorial restriction have not ignored the factual underpinning of this Court's analysis in *Schwinn*. Without exception, they have concluded that the element of "firm and resolute" insistence presents a question of fact. *Colorado Pump & Supply Co. v. Febco, Inc.*, 472 F.2d 637 (10th Cir.), *cert. denied*, 411 U.S. 987 (1973); *Janel Sales Corp.* v. *Lanvin Parfums, Inc.*, 396 F.2d 398 (2d Cir.), *cert. denied*, 393 U.S. 938 (1968).

Petitioner urges that two recent cases, *Copper Liquor, Inc.* v. *Adolph Coors Co.*, 506 F.2d 934 (5th Cir. 1975), and *Noble* v. *McClatchy Newspapers*, 1975-2 Trade Cases ¶ 60,594 (9th Cir. 1975), are in conflict with the decision below (Pet. 19). Not only does Petitioner fail to show any conflict, but both decisions are actually supportive of the rule applied by the Tenth Circuit below.

In *Copper Liquor*, as in the instant case, there was conflicting evidence on the fact question of compliance and enforcement. The district judge in that case, however, properly submitted the issue to the jury. On review, the Fifth Circuit expressly considered the "jury's finding that Coors had been 'firm and resolute' in enforcing the territorial restrictions" and upheld the finding as "not contrary to the manifest weight of the evidence." 506 F.2d at 944.

Similarly, in the *Noble* case, the Ninth Circuit discussed the conflict in the evidence between the terminology of the territorial provisions and the actual practice of the parties. Stating the issue as whether "the restriction existed in fact," the Court remitted that factual determination to the jury. 1975-2 Trade Cases at 67,635.

Thus, in both *Copper Liquor* and *Noble*, the reviewing courts, adhering strictly to *Schwinn*, applied the same analysis as did the court below and required the fact question of whether the contract and conduct of the parties constitute a territorial restraint to be submitted to the jury.

As in the Court of Appeals below, Petitioner here contends that "Shell firmly and resolutely enforced the resale restriction of Redd's jobber sales contract by its pricing and delivery practices" (Pet. 8). Although we believe the record facts indisputably establish the absence of actual restriction, the court below did not attempt to resolve the factual question. The District Court's summary judgment on that issue was sufficient to compel reversal. With the factual record in evident dispute, the court below remanded the case for determination of "the fact question of enforcement or compliance" (Pet. App. A-6).

The decision below neither encroaches on the *per se* rule of *Schwinn* nor conflicts with any other decision. With nothing more in issue here than the resolution of a

question of fact, which the trial court improperly removed from the province of the jury, there is no reason to grant the writ.

CONCLUSION

The Court of Appeals below applied conventional antitrust doctrines in reversing the District Court for improperly resolving questions before trial on summary motions. Several issues now remain to be resolved on the remand to the District Court. The Petition fails to demonstrate any conflict of decisions or raise any important questions of law warranting review by this Court. Accordingly, it should be denied.

Respectfully submitted,

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